BRB No. 05-0541 BLA

McKINLEY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/24/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

McKinley Bowling, Austin, Indiana, *pro se*.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant, without the assistance of counsel, appeals the Decision and Order on Reconsideration (04-BLA-5194) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) denying benefits on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] In a Decision and Order dated November 22, 2004, the

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All

administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence sufficient to establish a "material" change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Turning to the merits of the case, although the administrative law judge found the

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his first claim with the Social Security Administration (SSA) on May 11, 1970. Director's Exhibit 1. This claim was denied by the SSA on May 7, 1971, November 26, 1971, July 23, 1973, October 14, 1975, and February 17, 1976. *Id*. Further, District Judge James E. Noland of the United States District Court for the Southern District of Indiana issued a Judgment Order on July 22, 1976, affirming the denials by the SSA. *Id*. Claimant filed his second claim, which constituted a request for modification, with the Department of Labor (DOL) on October 22, 1976. *Id*. On October 7, 1985, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order denying benefits. *Id*. Judge Jansen's denial was based on his finding that the evidence was sufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(1) and (b)(2). *Id*. The Board affirmed Judge Jansen's denial of benefits. *Bowling v. Director, OWCP*, BRB No. 85-2510 BLA (Dec. 22, 1989)(unpub.). In addition, the United States Court of Appeals for the Sixth Circuit affirmed the Board's decision. *Bowling v. Director, OWCP*, No. 90-3141 (6th Cir. Nov. 30, 1990). Because claimant did not pursue this claim any further, the denial became final. Claimant filed his third claim with the DOL on August 10, 1995. Director's Exhibit 2. The DOL denied this claim on December 7, 1995, May 8, 1996, and September 6, 1996. *Id*. The DOL's December 7, 1995 denial was based on its finding that the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. *Id*. Although the DOL's May 8, 1996 denial was only based on its finding that the evidence did not show that claimant was totally disabled due to a respiratory impairment arising out of his coal mine employment, the DOL's September 6, 1996 denial was based on its determination that the evidence did not support a finding of black lung disease and total disability due to the disease. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his most recent claim on January 27, 2003. Director's Exhibit 4.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2. As claimant's most recent claim was filed after January 19, 2001, claimant filed a "subsequent claim" as opposed to a "duplicate claim." Director's Exhibit 4. Thus, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a "change in an applicable condition of entitlement" at 20 C.F.R. §725.309. *Compare* 20 C.F.R. §725.309 *with* 20 C.F.R. §725.309

evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), he found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. However, in a subsequent Decision and Order on Reconsideration dated February 28, 2005, the administrative law judge granted the Director's motion for reconsideration and found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[4] Further, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding 20 C.F.R. §718.204(b)(2)(i), the administrative law judge, in his November 22, 2004 Decision and Order, found the pulmonary function study evidence insufficient to establish total disability. The record consists of ten pulmonary function studies dated May 2,

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(2000). However, because the administrative law judge applied the revised regulations when considering the merits of the claim and we affirm the administrative law judge's decision on the merits at 20 C.F.R. §718.204(b), as discussed *infra*, the administrative law judge's error in considering the newly submitted evidence at 20 C.F.R. §725.309 (2000) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]In his February 28, 2005 Decision and Order on Reconsideration, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) stated that the Director, Office of Workers' Compensation Programs (the Director), specifically cited to his findings regarding Dr. Alcorn's disability opinion as the ground for the request for reconsideration. 2005 Decision and Order on Reconsideration at 1. The administrative law judge also stated, "[a]s the Director did not note specific challenges with respect to the remainder of my Decision and Order, I continue to rely on my previous determinations." *Id*. at 2.

1973, November 9, 1973, March 4, 1975, April 19, 1977, July 18, 1979, June 10, 1980, September 1, 1995, March 19, 1996, April 16, 2003, and August 20, 2003. The administrative law judge correctly stated that "[a]ll studies, except the August 20, 2003 study, failed to produce qualifying values indicative of total disability."[5] 2004 Decision and Order at 7; Director's Exhibits 1, 2, 10, 19. Although the August 20, 2003 pulmonary function study yielded non-qualifying pre-bronchodilator values, the same study yielded qualifying post-bronchodilator values. Director's Exhibit 19. Thus, since nine of the ten pulmonary function studies of record yielded non-qualifying values, we affirm the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i).

Next, the administrative law judge, in his November 22, 2004 Decision and Order, found the arterial blood gas study evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The record consists of four arterial blood gas studies dated April 9, 1979, September 1, 1995, April 16, 2003, and August 20, 2003. Since none of the arterial blood gas studies of record yielded qualifying values, Director's Exhibits 1, 2, 9, 19, we affirm the administrative law judge's finding that the arterial blood gas study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii). Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because there is no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

Finally, the administrative law judge, in his February 28, 2005 Decision and Order on Reconsideration, found the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The record consists of the newly submitted reports of Drs. Alcorn, and Powell,[6] and the previously submitted reports of Drs. Clarke, Farber, Lane, Long, Odom, Rucker, Williams, and an unknown physician,[7] as well as Dr. Boggs's

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[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

[6]While Dr. Alcorn, in a report dated August 15, 2003, opined that claimant appears disabled, Director's Exhibit 18, Dr. Powell, in a report dated April 16, 2003, opined that claimant does not suffer from a respiratory impairment. Director's Exhibit 8.

[7]In reports dated July 31, 1979, June 9, 1982, and March 21, 1996, Dr. Clarke opined that claimant suffers from a disabling respiratory impairment. Director's Exhibits 1, 2. Likewise, in a report dated March 6, 1975, Dr. Odom opined that claimant is totally disabled

treatment records.[8] In his November 22, 2004 Decision and Order, the administrative law judge properly accorded greater weight to the opinions of Drs. Alcorn and Powell than to the opinions of Drs. Clarke, Farber, Lane, Long, Odom, Rucker, Williams, and the unknown physician because the opinions of Drs. Alcorn and Powell are more reflective of claimant's current physical condition. *See generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). The administrative law judge specifically stated:

> As the reports dating from 1973 to 1996 along with consultative reviews of such are between eight and thirty-one years old, I afford these medical opinions less weight. Accordingly, I grant greater weight to the two most recent reports by Drs. Powell and Alcorn, which are only slightly over a year old.

2004 Decision and Order at 10. Further, in considering the conflicting opinions of Drs. Alcorn and Powell, the administrative law judge initially found that Dr. Alcorn's opinion outweighed Dr. Powell's contrary opinion on the basis that Dr. Alcorn's opinion was better reasoned than Dr. Powell's opinion.[9] *Id*. However, in his February 28, 2005 Decision and

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for coal mining work or work in a dusty environment. Director's Exhibit 1. Dr. Rucker, in a report dated April 21, 1977, opined that claimant suffers from a mild impairment. Director's Exhibit 1. In contrast, in a report dated August 27, 1996, Dr. Long opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 2. In a December 27, 1974 report, Dr. Williams opined that claimant is "suitable for employment in the mines." Director's Exhibit 1. Dr. Farber, in a report dated September 1, 1995, did not render an opinion with regard to the issue of total disability. Director's Exhibit 2. Similarly, in a report dated June 10, 1980, Dr. Lane did not render an opinion with regard to the issue of total disability. Director's Exhibit 1. Lastly, in a report dated May 6, 1973, a physician, whose signature is illegible, noted shortness of breath on slight physical exertion. Director's Exhibit 1.

[8]The administrative law judge noted that the record also contains Dr. Boggs's October 8, 1963 and January 31, 1965 hospital treatment records. 2004 Decision and Order at 8. However, the administrative law judge accorded these records little weight because they are not relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. In considering Dr. Boggs's treatment records, the administrative law judge stated that "they relate to a facial injury that the [c]laimant suffered as a result of a mining accident and right back and leg problems." *Id*.

[9]In his November 22, 2004 Decision and Order, the administrative law judge stated that Dr. Alcorn's disability opinion was well-reasoned and well-documented. 2004 Decision

Order on Reconsideration, the administrative law judge properly discounted Dr. Alcorn's disability opinion on the ground that it does not conform to the regulations as Dr. Alcorn lacked knowledge of claimant's employment history.[10] *See* 20 C.F.R. §718.104. Dr. Alcorn's report does *not* include claimant's employment history. Director's Exhibit 18. In considering Dr. Alcorn's disability opinion, in his second decision, the administrative law judge specifically stated:

> Dr. Alcorn's report is void of the [c]laimant's employment history. Moreover, a finding of total disability requires the [c]laimant to have a pulmonary or respiratory impairment that prevents him or her "from performing his or her usual coal mine work," and "from engaging in gainful employment … in which he or she previously engaged in with some regularity over a substantial period of time." §718.204(a). Without knowledge of the [c]laimant's employment history, Dr. Alcorn would be unable to make an accurate finding of total disability because he would not be aware of the [c]laimant's prior occupational duties. Therefore, I reverse my finding in the November 22, 2004 Decision and Order, and find that Dr. Alcorn's opinion is not in accordance with the [r]egulations nor is it well-reasoned or well-documented.

2005 Decision and Order on Reconsideration at 2. Thus, since the administrative law judge properly discounted Dr. Alcorn's disability opinion, the only opinion of record that could support a finding of total disability, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R.

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and Order at 9, 10. In contrast, the administrative law judge found that Dr. Powell's opinion was not well-reasoned. *Id*. at 10. The administrative law judge specifically stated:

> Dr. Powell noted in the impairment section of his report "no chronic respiratory disease (except CWP), no respiratory impairment." Then he further stated in the section which lists the extent to which diagnoses contribute to an impairment "100% of CWP." As his report does not list an impairment or the degree of an impairment, coal workers' pneumoconiosis cannot be the cause of such an impairment. Thus, his report is internally inconsistent and inadequately reasoned, and as such it will be given little weight.

Id.

[10]Section 718.104(a)(1) provides that a report of any physical examination conducted in connection with a claim *shall* include the miner's medical and employment history. *See* 20 C.F.R. §718.104(a)(1).

§718.204(b)(2)(iv). Furthermore, as the Director asserts, because Dr. Alcorn did not clearly set forth the details of claimant's alleged limitations, the administrative law judge was not able to compare them with the exertional requirements of claimant's usual coal mine employment. *Cf. Collins v. J&L Steel*, 21 BLR 1-181, 1-191 (1999)(administrative law judge may infer disability based upon the physician's assessment of the miner's limitations).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the administrative law judge's decision denying benefits, but I disagree with the majority's determination that the administrative law judge properly discounted Dr. Alcorn's opinion pursuant to 20 C.F.R. §718.204.

The administrative law judge provided two reasons for rejecting Dr. Alcorn's opinion, neither of which is valid. First, the administrative law judge discredited the opinion because

it fails to conform to the regulations, specifically, the criterion in Section 718.104(a)(1) that a medical report contain a statement of "the miner's medical and employment history…."[11] Decision and Order on Reconsideration at 2. Second, the administrative law judge held that a medical opinion finding a miner totally disabled is not credible unless it reflects knowledge of claimant's prior occupational duties. *Id*.

In upholding the administrative law judge's discrediting of Dr. Alcorn's report on the stated grounds, the majority contravenes the Board's *en banc* decision in *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). In *Budash*, the Board held that medical evidence which does not satisfy the quality standards of a medical report, as set forth in Section 718.104, cannot be excluded on that account because the statute mandates that all relevant evidence be considered. 30 U.S.C. §923(b); *Budash*, 9 BLR at 1-50. The Board expressly held "Section 718.104 as solely delineating the internal policy guiding the Deputy Commissioner in developing its medical evidence, and Section 718.104 may not be used to preclude relevant medical evidence from consideration before the administrative law judge." *Budash*, 9 BLR at 1-51. Yet today the majority approves the administrative law judge's reliance on Section 718.104 to preclude consideration of relevant evidence.

Not only did the administrative law judge err in holding mandatory the standards of Section 718.104, the administrative law judge also erred in holding that an opinion finding total disability cannot be credible unless it reflects knowledge of the exertional requirements of claimant's most recent coal mine employment. Again, in *Budash* the Board held *en banc* that to constitute substantial evidence of total disability, a doctor's report "needs to describe either the severity of the impairment or the physical effects imposed by claimant's respiratory impairment sufficiently so that the administrative law judge can infer that the claimant is totally disabled." *Budash*, 9 BLR at 1-51. Such a medical opinion need not identify claimant's coal mine job.

It is noteworthy that the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has twice expressed its agreement with the Board's decision in *Budash*. *See Eversole v. Shamrock Co*., No. 93-3527, 1994 WL 376895 (6th Cir. July 18, 1994); *Muncy v. Director, OWCP*, No. 90-3568, 1991 WL 71403 (6th Cir. May 2, 1991). The Third Circuit has similarly held that "an ALJ may find a miner totally disabled in reliance upon a medical judgment in a [non-conforming] report so long as the judgment is reasoned and based on medically acceptable evidence as required by §718.204(c)(4)." *Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-267 (3d

[11] Although the administrative law judge referenced Section 718.104, he erroneously cited Section 718.204. Decision and Order on Reconsideration at 2.

Cir. 1990). There is no legal authority supporting the administrative law judge's holding that Section 718.104 is mandatory. Needless to say, the majority is unable to cite any authority for its decision to uphold the administrative law judge's determination.

Similarly, there is no legal authority that a credible medical opinion finding a claimant totally disabled must reflect knowledge of the exertional requirements of his most recent coal mine employment. The Sixth Circuit has made clear that an administrative law judge should not credit a medical opinion that claimant is *not* totally disabled unless the administrative law judge determines the doctor knows the exertional requirements of claimant's work. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). However, an administrative law judge may infer a claimant is totally disabled by comparing the exertional requirements of claimant's mine work with the doctor's description of claimant's pulmonary impairment, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124 (a mild impairment may be totally disabling), or by comparing the exertional requirements with the doctor's assessment of claimant's limitations. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir 1996). There is no legal authority to support the administrative law judge's determination that a credible medical opinion of total disability must manifest knowledge of the exertional requirements of claimant's usual coal mine employment. Again, the majority is unable to cite any legal authority for its decision to uphold the administrative law judge's ruling.

In sum, both of the administrative law judge's reasons for rejecting Dr. Alcorn's opinion are invalid. *Budash*, 9 BLR at 1-50-1. However, because Dr. Alcorn's opinion was not a reasoned medical opinion, as the Director correctly argues, it could not support a finding of total disability and the administrative law judge's determination to reject the opinion for invalid reasons must be deemed harmless error.[12] Accordingly, I believe that the administrative law judge erred in discrediting Dr. Alcorn's opinion for the reasons stated, but

[12]As the Director points out, Dr. Alcorn referenced a "quick [office] measurement" which indicated claimant had "30% of predicted" pulmonary function, but the doctor did not identify the test which was performed or how the finding would translate into actual restrictions of claimant's physical ability. Director's Letter at 2. The doctor also stated that he would verify his finding after he received the results of more sophisticated tests which had been ordered. However, Dr. Alcorn did not issue another report after he received those test results; furthermore, the results did not provide clear support for his earlier impression of respiratory disability. *Id*.

because it cannot be credited as a reasoned medical opinion, I would affirm the order denying benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge